No. 80-1085

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PETITIONERS

v.

WALTER C. BARBER, JR., ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing an order of the district court preliminarily enjoining the operation of a federal statute where plaintiffs who challenged that statute as an unconstitutional taking of their property had failed to demonstrate any likelihood of success in proving that they did not have an adequate legal remedy under the Tucker Act.

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The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 632 F. 2d 1014. The opinion of the district court (Pet. App. 11a-17a) is reported at 481 F. Supp. 195.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1980. A petition for rehearing was denied on November 5, 1980 (Pet. App. 21a-22a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1947, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), now codified at 7 U.S.C. (& Supp. III) 136 *et seq.*, has required pesticide manufacturers to register their products before those products could be sold in the United States. Before 1970, registrations were granted by the United States Department of Agriculture (USDA); and the Food and Drug Administration (FDA) was responsible for issuing tolerances to manufacturers for those pesticides that are applied to food and feed crops (Pet. App. 3a; Pet. 4n. 3).[1] Since 1970 the Environmental Protection Agency (EPA) has performed both those functions. 7 U.S.C. (& Supp. III) 136a; 21 U.S.C. 346a.

The agency's decision whether to register a particular pesticide product depends upon its evaluation of both the effectiveness of the product and the dangers presented by its use to human, animal, or plant life. See 7 U.S.C. 136(bb), 136a(c)(5)(C)-(D). Similarly, the issuance of a tolerance depends upon an evaluation of the dangers that the pesticide residue poses to consumers who will be exposed to pesticide residues in food. To carry out these regulatory responsibilities, EPA and its predecessors have required

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[1] A "tolerance" defines the level of the pesticide product and its degradation products which cannot be exceeded in food. The level at which a tolerance is set is the level required to protect the public from adverse health effects caused by pesticides. See 21 U.S.C. 346a(b).

manufacturers to submit a variety of test data in support of applications for registrations and petitions for tolerances (Pet. App. 3a). These data define the risks and benefits of the products for which registration is sought and generally include test data reflecting the effectiveness of the pesticides in performing their pest suppression function ("efficacy data") and test results concerning the dangers of the product ("hazard data").[2] The question whether EPA may disclose such data to the public or may use it in assessing the applications of persons other than the data-submitters has been the subject of extensive debate during the past decade, and Congress has produced several differing solutions. Petitioners' suit challenges the latest amendment, which permits public disclosure of certain categories of data and which, with certain limitations, permits EPA to consider the data in assessing any applications to which it is relevant.

As originally enacted in 1947 (ch. 125, 61 Stat. 163), FIFRA did not prohibit USDA from considering relevant data supplied to it by one applicant to determine whether to register the products of other companies. Because many of the pesticides for which registrations were sought were the same or substantially the same as previously registered products supported by data submitted to USDA (see S.

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[2]Hazard data consist of the following major types of studies: 1) acute toxicity studies, which define how poisonous the pesticide is when ingested, inhaled, or applied to the skin or eyes; 2) chronic toxicity studies, which are used to determine if chronic exposure to the pesticide will have any long-term health effects such as causing cancer or birth defects; 3) residue studies, which define the level of the pesticide and its degradation products which remain in the food; 4) environmental chemistry studies, which are used to determine how much of the pesticide and its degradation products remain in the environment after application; and 5) fish and wildlife studies, which define how toxic the pesticide is to fish and wildlife which may be exposed to the pesticide after application in the environment.

Rep. No. 95-334, 95th Cong., 1st Sess. 7 (1977)), USDA frequently did not require the later applicant in effect to duplicate the tests which USDA already had in its files. See *Amchem Products, Inc.* v. *GAF Corp.*, 391 F. Supp. 124, 127-128 & n.7 (N.D. Ga. 1975), remanded on other grounds, 529 F. 2d 1297 (5th Cir. 1976).

The 1947 law also contained no prohibition against disclosure of hazard and efficacy data, but it did specifically prohibit disclosure of product formulas (7 U.S.C. (1970 ed.) 135a(c)(4) and 135f(c)). As a matter of agency practice, USDA did not make public any of the data submitted to it (Pet. App. 3a). Similarly, although 21 U.S.C. 346a did not prohibit the disclosure of data submitted in support of petitions for tolerances, FDA as a matter of agency practice did not make those data public.

In 1972, FIFRA was substantially revised by the Federal Environmental Pesticide Control Act (Pub. L. No. 92-516, 86 Stat. 973) ("1972 Amendments")). One of the most significant changes was the addition of a new Section 10 (7 U.S.C. (1970 ed., Supp. II) 136h) governing disclosure of data submitted in support of applications for registration.[3] That Section allowed applicants to identify for EPA which portions of their data they regarded as "trade secrets or commercial or financial information" (Section 10(a)) and it prohibited the EPA Administrator from publicly disclosing any "information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential" (Section 10(b)). The 1972 Amendments did not, however, define the term "trade secrets."

In response to complaints from some sectors of the pesticide industry, Congress also added a new Section 3(c)(1)(D), 7 U.S.C. (1970 ed., Supp. II) 136a(c)(1)(D)),

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[3]Section 10 as enacted in 1972 is set forth at Pet. App. 33a-34a.

which, for the first time, limited EPA's freedom to consider data submitted by one company in evaluating another company's application for registration.[4] Under Section 3(c)(1)(D), EPA was prohibited from making such use of "trade secret" information without the permission of the data submitter. While it could consider all other types of information without the permission of the data submitter, it could do so in a given case only if the applicant "offered to pay reasonable compensation [to the data submitter] for producing the test data to be relied upon." (*Ibid.*)

The 1972 Amendments left unclear whether the Section 3(c)(1)(D) limitations on consideration of data applied to all data in EPA's files prior to the effective date of the 1972 Amendments. To resolve this ambiguity, Congress amended Section 3(c)(1)(D) in 1975 to provide specifically that the limitations imposed by that section were applicable *only* to data submitted on or after January 1, 1970. FIFRA of 1975, Pub. L. No. 94-140, 89 Stat. 751, 755 ("1975 Amendments").[5]

The extent of the Section 10 disclosure limitation and the Section 3(c)(1)(D) data-consideration limitation remained unclear in other respects, however, because of Congress's

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[4]Section 3(c)(1)(D) as enacted in 1972 is set forth at Pet. App. 33a. The section was added at the request of industry representatives, notably the National Agricultural Chemicals Association, a pesticide industry trade association. See, *e.g.*, *Federal Pesticide Control Act of 1971: Hearings on H.R. 26, H.R. 1077, H.R. 1722, etc. Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 331 (1971).

[5]Mobay Chemical Corporation challenged the 1975 Amendments on constitutional grounds, arguing that Section 3(c)(1)(D) caused an unconstitutional taking of its property rights in the data it had submitted prior to January 1, 1970. This claim was rejected by a three-judge court, which held that Section 3(c)(1)(D) did not "take" any of Mobay's property rights. *Mobay Chemical Corp.* v. *Costle*, 12 Envir. Rep. Cases 1572 (W.D. Mo. 1978). Mobay's direct appeal to this Court under 28 U.S.C. 1253 was dismissed on the ground that the three-judge court had been improperly convened. 439 U.S. 320 (1979). No appeal was taken to the Eighth Circuit.

failure to define the term "trade secret." EPA took the view that in the 1972 and 1975 Amendments, Congress had intended to give trade secret protection to only a narrow range of data—principally statements of formulas and manufacturing processes. EPA thus concluded that most hazard and efficacy data could be disclosed to the public and could be considered by EPA in evaluating registration applications without the permission of the data-submitter. Data-submitting firms successfully challenged this interpretation in the courts, obtaining decisions holding that the 1972 Congress had intended the "trade secret" prohibition to apply to any data, including hazard and efficacy data, that met the criteria specified in Section 757 of the *Restatement of Torts* (1939). *E.g., Chevron Chemical Co.* v. *Costle,* 443 F. Supp. 1024 (N.D. Cal. 1978); *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). As a result of these decisions, the "trade secret" prohibition in Section 10 operated to bar public access to much of the data on which EPA based its decisions to register pesticides; and the corresponding prohibition in Section 3(c)(1)(D) allowed data-submitters to prevent any other firm from obtaining registrations for products that were the same or substantially the same as previously registered products unless the second firm duplicated the data supporting the first registration or it was determined, after perhaps years of litigation, that particular items of data were not trade secrets. In part because of such "trade secret" controversies and the complexities of determining compensation for data use, "the process of registering new pesticides simply ground to a halt." *Chevron Chemical Co.* v. *Costle*, No. 80-2037 (3d Cir. Feb. 4, 1981), slip op. 14 (footnote omitted).[6]

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[6]In *Chevron Chemical*, the Third Circuit held that Section 3(c)(1)(D), as amended in 1978, does not constitute a taking of property within the meaning of the Fifth Amendment.

In 1978, Congress again amended FIFRA, enacting the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 ("1978 Amendments"). It substantially changed Section 3(c)(1)(D) and Section 10 in order to cure the problems caused by the courts' interpretation of the term "trade secret." A new provision, Section 10(d) (7 U.S.C. (Supp. III) 136h(d)), was added, making hazard and efficacy data available for public disclosure.[7] Because of their significance for public health and safety, and because Congress believed it desirable to inform the public of the bases for agency decisions, EPA is now expressly authorized to disclose hazard and efficacy data even if such data may be "trade secrets" under the *Restatement of Torts* definition. See, *e.g.*, H.R. Rep. No. 95-663, 95th Cong., 1st Sess. 18 (1977).

Congress also abolished the 1972 Section 3(c)(1)(D) prohibition on agency use of "trade secret" data, recognizing that a regulatory scheme under which only registered pesticides of proven safety and effectiveness could be marketed gave an unfair competitive advantage to certain large manufacturers, who were protected from competition even after any patent had expired: small potential competitors

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[7]Under Section 10(d)(1), 7 U.S.C. (Supp. III) 136h(d)(1), EPA may disclose "[a]ll information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil, and studies on persistence, translocation, and fate in the environment, and metabolism." That same section, however, prohibits EPA from disclosing information that would reveal "manufacturing or quality control processes" or certain details pertaining to "deliberately added" inert ingredients; but these limitations do not apply if "the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment."

were discouraged from entering the market by the necessity of duplicating safety and efficacy tests for products already established as safe and effective by data that were contained in agency files but were rendered inaccessible by statute. See, *e.g.*, S. Rep. No. 95-334, 95th Cong., 1st Sess. 8, 30-31 (1977); see also 124 Cong. Rec. S15303-S15304 (daily ed. Sept. 18, 1978) (remarks of Sen. Leahy). In place of the flat prohibition on agency use of "trade secret" data, Congress amended Section 3(c)(1)(D) to establish a comprehensive scheme governing EPA's consideration of test data submitted by pesticide registrants in issuing registrations to subsequent applicants for registration of the same or substantially similar pesticides. It provides for certain protected periods during which the data generally may not be used in this manner by EPA without the written permission of the original data submitter (Section 3(c)(1)(D)(i)) and other periods during which data may be considered without such permission, provided that the applicant makes an offer to compensate the data submitter (Section 3(c)(1)(D)(ii)). (If the parties cannot agree on compensation, the amount is fixed by an arbitrator (*ibid.*).) After expiration of such periods, test data may be considered without restriction (Section 3(c)(1)(D)(iii)).

2. This suit was filed in 1976 to challenge EPA's interpretation of FIFRA. Following enactment of the 1978 Amendments, petitioners amended their complaint to allege that the amended Act violated the Constitution. Their principal allegation was that, with respect to data submitted before passage of the 1978 Amendments, Sections 3(c)(1)(D) and 10 of FIFRA constituted a retroactive taking of their "trade secret properties" without just compensation, in violation of the Fifth Amendment (Pet. App. 11a, 13a).

In opposition to petitioners' motion for a preliminary injunction, EPA contended that, even assuming arguendo that those provisions constituted a taking of petitioners'

property, injunctive relief was inappropriate because petitioners had an adequate remedy at law under the Tucker Act, 28 U.S.C. 1491. Rejecting this argument, the district court agreed to restrain EPA from "disclosing trade secret research data and from using this data for the benefit of competitors in the issuance of pesticide registrations * * * pending a trial on the merits" (Pet. App. 17a), and it entered an order to this effect, applicable to data submitted before September 30, 1978 (*id.* at 19a-20a). The district court based its decision on its conclusions that the availability of the Tucker Act was "not * * * at all clear" (*id.* at 15a-16a), that the amended statutory provisions for agency consideration and disclosure of certain pre-1978 test data had produced "a severe diminution of the value of [petitioners'] property" (*id.* at 16a), and that petitioners had, therefore, presented "serious questions going to the merits to make them a fair ground for litigation, with the balance of hardship tipping decidedly toward [petitioners]" (*ibid.*). The court also noted, concerning the Tucker Act question, that petitioners were not seeking damages but were asking for "a declaratory judgment of unconstitutionality prior to sustaining potentially uncompensable damages" and that petitioners could properly seek such relief (*ibid.*).

3. EPA appealed the grant of the preliminary injunction and the court of appeals reversed (Pet. App. 1a-9a). It held that the district court had erred in failing to require petitioners to show both a likelihood of success on the merits and a threat of irreparable harm (*id.* at 6a). The court of appeals explained that "[w]hen Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order" (*ibid.*). Although the court found (*id.* at 7a) that petitioners' taking allegations "raise knotty questions that are difficult to answer on the present record," it concluded

(*id.* at 8a) that petitioners had failed to make a sufficient showing that they are without an adequate remedy in the Court of Claims under the Tucker Act so as to justify injunctive relief. Citing this Court's decision in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the court of appeals observed (Pet. App. 8a-9a) that "[i]f compensation under the Tucker Act is available, injunctive relief is not" and that the test for Tucker Act coverage is whether the Act was withdrawn by Congress in its enactment of FIFRA. As the court of appeals noted (*id.* at 9a), the district court had found only that a question concerning such withdrawal existed, not that Congress actually—or even probably—had withdrawn the Tucker Act remedy as to any uses of trade secret data found by a court to constitute a taking of property within the meaning of the Fifth Amendment.

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioners' contentions, does not conflict with decisions of this Court or of other courts of appeals. It accordingly presents no issue meriting review by this Court.

1. The court of appeals held (Pet. App. 6a) that in cases in which plaintiffs seek to enjoin the operation of a statute, entitlement to a preliminary injunction requires a showing of irreparable harm and likelihood of success on the merits. It was error, the court stated (*ibid.*), to apply the "less onerous" test, appropriate in other types of cases, according to which preliminary relief is available on a showing of "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the moving party." In making this distinction, the court of appeals was saying nothing more than that, in cases in which an injunction will necessarily delay effectuation of the public interest as expressed by Congress in a statute, a stronger showing must be made

with respect to possible success on the merits than is the case where no such threat to the public interest is posed. As demonstrated below (pages 12-15), the relevant authorities, including cases cited by petitioners, support that proposition.

But even assuming that the court of appeals was wrong in holding that petitioners were required to show a likelihood of success on the merits of their claims, the judgment of the court was still proper, because a major weakness of petitioners' showing on the merits—*i.e.*, their inability, in the estimation of both courts below, to make a substantial showing that relief under the Tucker Act would be unavailable to them for any constitutional injuries they might ultimately prove—also seriously impaired their showing of a threat of irreparable harm. Petitioners have cited no case in which the operation of a statute was enjoined in such circumstances, and for this reason, as the court of appeals noted (Pet. App. 6a), petitioners' claims would fail regardless of which of the two tests is applied.

2. We treat the Tucker Act point first, because we believe it reveals the narrowness of the ruling in this case and, hence, the inappropriateness of this case as a vehicle for enunciating general principles concerning the proper test for the grant of a preliminary injunction.

The district court manifestly did not question the applicability of the Tucker Act to the kinds of constitutional claims raised by petitioners, and it acknowledged that, as this Court has held in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974), the proper question is not whether Congress has affirmatively made the Tucker Act applicable with respect to constitutional injuries inflicted by the operation of a given statute, but whether Congress has withdrawn the Tucker Act remedy. The district court did not find it probable that Congress had withdrawn the Tucker Act remedy, but merely held (1) that there was a

"question" whether Congress might have withdrawn the remedy when it amended FIFRA in 1978 and (2) that, in any event, petitioners sought injunctive relief rather than damages.

In fact, the district court's basis for concluding that Congress might have withdrawn the Tucker Act remedy—the existence of limited payment provisions in the 1978 Amendments (see Pet. App. 6a)—does not logically support such a conclusion. Indeed, the compensation provisions demonstrate that Congress believed that the interests in question—at least as to consideration of data for the benefit of competitors—were reducible to monetary equivalents; they would therefore be amenable to treatment under a damage remedy such as the Tucker Act. That Congress did not provide in the 1978 Amendments for compensation by the United States shows not that Congress rejected the application of the Tucker Act but rather that it assumed—and we believe correctly so—that the amendments were not invalid absent "just compensation," *i.e.*, that they did not constitute a taking of property within the meaning of the Fifth Amendment. Although the Tucker Act question is a purely legal issue and was fully briefed below, petitioners adduced no legislative history to strengthen the unpersuasive reasoning of the district court.

If, as both courts below assumed, the Tucker Act applies to the types of constitutional claims asserted by petitoners and there is only a negligible showing of withdrawal of that remedy, then petitioners cannot be said to have made a strong showing either that they would succeed on the merits of their claims or that they faced a serious threat of irreparable harm. This case is therefore clearly distinguishable from decisions of this Court on which petitioners principally rely (Pet. 12-14). In *Brown* v. *Chote*, 411 U.S. 452 (1973), the Court noted that the applicant for preliminary injunctive relief—an individual who challenged the imposi-

tion of a filing fee as a prerequisite to having his name placed on the primary ballot for a state office—would have been "foreclosed, absent some relief," from any opportunity to be a candidate in the election in question. 411 U.S. at 457. Similarly, in *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929), this Court found that if the injunction were denied, the "injury to the moving party [would] be *certain* and irreparable." 279 U.S. at 815 (emphasis supplied).[8]

The fact that petitioners chose to pursue injunctive relief rather than damages adds nothing to their case. If the Tucker Act is available, then their claim that the statute is invalid as an uncompensated taking of their property must fail. *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 133-134; see also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 703 n.27 (1949).

3. The cases on which petitioners rely (Pet. 14-18; Supp. Pet. 1-4) to support their contention that the decision below conflicts with decisions of other circuits are either cases in which no statute was enjoined[9] or cases in which

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[8] *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), offers petitioners even less support. The Court there reversed the grant of an injunction, and petitioners' reliance (Pet. 13) is on dictum in the plurality opinion indicating (412 U.S. at 822 n.15) that "[i]n some cases" the possibility of irreparable damage might be "great enough" to justify issuance of an injunction even in the absence of a showing of likelihood of success on the merits. The cases cited as examples of this (*ibid.*) are cases from the Second Circuit involving only the rights of private parties and not involving an order enjoining the operation of a statute.

[9] *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, No. 80-1111 (8th Cir. Jan. 7, 1981) (en banc); *Roth* v. *Bank of the Commonwealth*, 583 F. 2d 527 (6th Cir. 1978), cert. dismissed, 442 U.S. 925 (1979); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977); *Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*,

injunctive relief was denied.[10] The former obviously do not conflict with the decison below since the court of appeals did not purport to announce any rule applicable to such cases. The latter at best supply isolated dicta in support of petitioners' arguments.

Indeed, some of the cases on which petitioners rely affirmatively support the court of appeals' decision in this case. The general rule is that the decision whether to grant the extraordinary remedy of a preliminary injunction turns on a "flexible interplay of the four factors to be considered." *Telvest, Inc.* v. *Bradshaw*, 618 F. 2d 1029, 1032 (4th Cir. 1980). Accord, *Roth* v. *Bank of the Commonwealth*, 583 F. 2d 527 (6th Cir. 1978), cert. dismissed, 442 U.S. 925 (1979). These four factors are:

> (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
>
> (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> (3) the probability that plaintiff will succeed on the merits; and
>
> (4) the public interest.

C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2948, at 430-431 (1973). The strength of the showing required in a particular case as to any given factor depends on the showing made with respect to the other factors. In

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550 F. 2d 189 (4th Cir. 1977); *Aguirre* v. *Chula Vista Sanitary Service*, 542 F. 2d 779 (9th Cir. 1976); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F. 2d 86 (9th Cir. 1975).

[10]In *Telvest, Inc.* v. *Bradshaw*, 618 F. 2d 1029 (4th Cir. 1980), the Fourth Circuit reversed the grant of a preliminary injunction, and in *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F. 2d 811 (3d Cir. 1978), the Third Circuit affirmed the denial of a preliminary injunction.

particular, where a legislature has enacted a statute it deems essential to the effectuation of the public interest, and the injunction sought would interfere with the operation of that statute—with no assurance of any protection for the public interests the statute was designed to serve—a stronger showing may be required with respect to the other three factors than would otherwise be the case. As this Court observed in *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944) (citations and footnote omitted):

> [W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. This is but another application of the principle * * * that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Thus, in *Ohio Oil Co.* v. *Conway, supra*, in which this Court upheld a preliminary injunction temporarily relieving the plaintiff of the necessity of paying a state severance tax that would become unrecoverable once paid, the Court assured itself that the State would be adequately indemnified by an injunction bond to assure payment of the tax, with interest and penalties, in the event the constitutionality of the tax statute were upheld against plaintiff's challenge. 279 U.S. at 815. No such bond can assure that the anticompetitive effects and other injuries to the public interest which Congress foresaw as occurring in the absence of the 1978 Amendments to FIFRA would not occur while the injunction sought by petitioners is in effect.

Hence, in a case such as this, in which an injunction would interfere with the public interest as determined by Congress—a circumstance relevant to both the public interest factor and the infliction of harm on the defendant—the court of appeals properly required a reasonably strong showing of the possibility of success on the merits. As the Third Circuit noted in *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F. 2d 811 (1978), a case on which petitioners rely (Pet. 17-18):

> "[I]n a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate "even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required." In contrast, where the threatened irreparable injury is limited or is balanced to a substantial degree by countervailing injuries which would result to third parties, or to the public interest from the issuance of an injunction, "greater significance must be placed upon the likelihood that the party will ultimately succeed on the merits of the litigation."

573 F. 2d at 815 (footnotes omitted). See also *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, No. 80-1111 (8th Cir. Jan. 7, 1981) (Supp. Pet. App. 6a-7a) (lesser showing of possible success on the merits sufficient where the balance of *all* the other factors tips strongly in plaintiff's favor). Because the district court failed to take specific account of the public interest, the court of appeals, consistent with settled principles governing the issuance of preliminary injunctions, reversed the grant of the injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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